2012 IL App (2d) 110764-U
No. 2-11-0764
Order filed May 1, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE VILLAGE OF MUNDELEIN, Plaintiff-Appellant, v. GREGORY BATES, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Lake County. No. 11-DT-512 Honorable Helen S. Rozenberg, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: Plaintiff failed to show *prima facie* reversible error in the trial court's grant of defendant's petition to rescind his summary suspension for an invalid traffic stop: the trial court did not find, and a video recording did not show, that defendant unlawfully disengaged his turn signal before turning; and plaintiff did not address, with pertinent authority, the precise issue of whether, in the absence of any unusual driving conditions, defendant committed improper lane usage when he momentarily touched (but did not cross) the center line.

¶ 1 Defendant, Gregory Bates, was arrested for driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(1), (a)(2) (West 2010)). He subsequently filed a petition to rescind the statutory

summary suspension of his driving privileges. The trial court granted the petition and denied a motion by plaintiff, the Village of Mundelein, for reconsideration. This appeal followed.

¶ 2 The record on appeal does not contain a verbatim transcript of the testimony presented at the hearing on defendant's petition. Plaintiff filed a bystander's report with the trial court, but the court did not certify it, so it is not properly part of the record on appeal. See Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005). The trial court's written order granting defendant's petition states as follows:

> "This matter before the Court for hearing on Defendant's Petition to Rescind Summary Suspension, Parties present[,] Court hearing testimony from Officer Witt of the Mundelein Police Department and viewing video taken from [O]fficer Witt's squad car, [plaintiff] moving for [a] directed finding after [defendant's case], motion denied, [plaintiff] recalling Officer Witt, Court hearing additional testimony and argument from the parties.
>
> THE COURT HEREBY FINDS AS TO THE CHARGE OF FAILURE TO SIGNAL:
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> 1) Officer Witt viewed [defendant's] car stopped 30 feet from Route 83 with its left turn signal activated;
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> 2) [Defendant's] car remained in that state as the officer crossed Route 83, drove past [defendant's] car, made a U-turn and pulled up behind [defendant's] car;
>
> 3) As [O]fficer [Witt] pulled up behind [defendant's] car, the car started moving toward the intersection with Route 83;
>
> 4) Officer Witt testified that as [defendant's] car moved the last 30 feet toward the intersection the turn signal deactivated for approximately 5 seconds before [defendant] made a left turn onto Route 83;
>
> THE COURT ALSO FINDS AS TO THE CHARGE OF IMPROPER LANE USE:

1) The crossing of the center line testified to by Officer Witt occurred on a curved area of the roadway;

2) The alleged lane violations were approximately 6" crossing of lane lines and for a 'momentary' period as testified to by the officer.

WHEREFORE: [Defendant's] Petition to Rescind is granted based upon lack of reasonable grounds to effect the traffic stop."

¶ 3 The video recording referred to in the trial court's order is included in the record on appeal. It shows a vehicle traveling along a two-lane road toward an intersection controlled by a traffic light. The driver activates the left turn signal, merges into a protected left turn lane, and completes a left turn. It appears that the turn signal is flashing until the vehicle completes the turn. After completing the turn, the vehicle proceeds along a road divided into two lanes by a solid double yellow line. As the road curves to the left, the left rear tire veers such that it is touching the leftmost yellow line for approximately two to three seconds. The vehicle does not stray fully across that line.

¶ 4 In its motion for reconsideration, plaintiff argued, *inter alia*, that Witt was entitled to stop defendant's vehicle because "[t]he evidence was uncontradicted *** that the defendant did not have his turn signal activated for the last 30 feet prior to making a left turn onto Route 83." Plaintiff argued that defendant thus violated section 11-804(b) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-804(b) (West 2010)), which provides that "[a] signal of intention to turn right or left when required must be given continuously during not less than the last 100 feet traveled by the vehicle before turning within a business or residence district, and such signal must be given continuously during not less than the last 200 feet traveled by the vehicle before turning outside a business or residence district." In denying the motion, the trial court remarked as follows:

"This is a case that turns on the facts, and the officer testified that the left turn signal was deactivated briefly *during the execution of the left turn. An order that says that defendant's car moved the last 30 feet, that the signal was not on for the last 30 feet really is misleading.*

It was not on consistently *during the turn*. What I have noted since the hearing is that what I found generally to be the rule which is that turn signals tend to haphazardly go on and off without touching or any mechanical action taken by the driver during the course of the turn signal. My understanding from the officer's testimony is that that was exactly what he testified to. That it was the turn signal was deactivated briefly during the execution of the turn." (Emphases added.)

¶ 5 Defendant has not filed an appellee's brief. Accordingly, our review is governed by *First Capitol Mortgage Corp. v. Talandis Construction Co.*, 63 Ill. 2d 128, 133 (1976), which held that "if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed." Because, as will be explained, there is at least an arguable distinction between this case and any other heretofore decided in Illinois, we do not believe that a disposition on the merits is appropriate without defendant's participation. We affirm, however, because plaintiff has not made a *prima facie* case for reversal, which is a lower standard of review.

¶ 6 Section 11-501.1 of the Code (625 ILCS 5/11-501.1 (West 2010)), the so-called "implied consent law," provides that a motorist operating a vehicle on a public highway in Illinois is deemed to have consented that, if arrested for DUI, he or she will submit to chemical testing to determine

his or her blood alcohol level. If the motorist refuses to undergo testing, or submits to testing that reveals a blood alcohol level of 0.08 or more, his or her driving privileges will be summarily suspended. However, the motorist is entitled to rescission of the suspension if it resulted from an unconstitutional seizure of the motorist. See *People v. Crocker*, 267 Ill. App. 3d 343, 345 (1994). Where a motorist seeks rescission of the suspension, the trial court is charged with assessing the credibility of the witnesses and the weight to be given their testimony. *People v. Feddor*, 355 Ill. App. 3d 325, 330 (2005). On review, the trial court's findings of fact will not be disturbed unless they are against the manifest weight of the evidence. *People v. Rush*, 319 Ill. App. 3d 34, 38 (2001). However, the trial court's ultimate conclusion as to the legality of the seizure is reviewed *de novo*. *Rush*, 319 Ill. App. 3d at 38-39.

¶ 7 We have noted that "[a]n officer's observation of a traffic violation is sufficient to provide the officer with probable cause to arrest a defendant for the violation, and, thus, a stop is proper." *People v. Grier*, 407 Ill. App. 3d 553, 557 (2011). Plaintiff argues that Witt observed defendant violate the traffic laws twice—first by turning without signaling properly and second by "crossing" the center line after completing the turn. As to the first alleged violation, plaintiff cites its bystander's report and the trial court's written order for the proposition that defendant's turn signal "was not activated for at least 30 feet and five seconds prior to the turn." As noted, however, because the trial court did not certify the bystander's report, it cannot be considered in this appeal. And in ruling on plaintiff's motion for reconsideration, the trial court essentially retracted its finding that the turn signal was off as defendant approached the intersection. Instead, the trial court found that the turn signal disengaged during the course of the turn. The applicable provision of the Code requires only that a driver signal continuously *before* turning. Plaintiff does not argue that a driver

violates the law when his or her turn signal goes off during the course of a turn. Moreover, from our examination of the footage from the video camera in Witt's squad car, it appears that the turn signal actually remained on throughout the turn. Accordingly, plaintiff has not made a *prima facie* case for reversal on the basis that defendant turned without properly signaling.

¶ 8 We next consider whether Witt was entitled to stop defendant because defendant violated the law regarding lane usage. As previously noted, the trial court found as follows on the subject:

> "1) The crossing of the center line *testified to* by Officer Witt occurred on a curved area of the roadway;
>
> 2) The *alleged lane violations* were approximately 6" crossing of lane lines for a 'momentary' period *as testified to by the officer*." (Emphases added.)

Thus, the trial court did not expressly find that defendant had crossed the center line. The court merely recited that Witt had testified to that effect. However, Witt's testimony was not the only evidence bearing on this point. The videotape shows that defendant's vehicle drove *onto* the double yellow center line, but did not actually cross into the lane of oncoming traffic.

¶ 9 The principal cases cited by plaintiff involve two Code provisions—section 11-701(a) (625 ILCS 5/11-701(a) (West 2010)) and section 11-709(a) (625 ILCS 5/11-709(a) (West 2010)). Section 701(a) of the Code provides:

> "(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:
>
> 1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movements;

2. When an obstruction exists making it necessary to drive to the left of the center of the roadway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the roadway within such distance as to constitute an immediate hazard;

3. Upon a roadway divided into 3 marked lanes for traffic under the rules applicable thereon;

4. Upon a roadway restricted to one way traffic;

5. Whenever there is a single track paved road on one side of the public highway and 2 vehicles meet thereon, the driver on whose right is the wider shoulder shall give the right-of-way on such pavement to the other vehicle." 625 ILCS 5/11-701(a) (West 2010).

¶ 10 In *Village of Lincolnshire v. DiSpirito*, 195 Ill. App. 3d 859, 863-64 (1990), we cited this provision for the proposition that "vehicles are generally required to drive on the right-hand side of the center line on the roadway." We held that a police officer had authority to stop a motorist who drove his westbound vehicle "completely into the eastbound lane of Old Half Day Road for about 100 feet until he drifted back into the westbound lane." *Id.* at 861. In *Rush*, 319 Ill. App. 3d at 40, we relied on *DiSpirito* to hold that "a driver's single, momentary *crossing* of the center line, without more, is a sufficient basis for a stop." (Emphasis added.) In contrast to the motorists in *DiSpirito* and *Rush,* defendant merely *drove onto* the center line; his vehicle did not cross the center line. We are aware of no published decision in Illinois holding that merely driving onto the center line is grounds for a traffic stop, and it is by no means clear that *DiSpirito* and *Rush* should be extended to such cases. We note that section 11-701(a) makes no reference to the center line; it requires a driver

to remain in the right half of the road. The statement in *DiSpirito* that section 11-701 requires a motorist to drive to the right of the *center line* assumes that the center line divides the roadway into lanes of equal width. This need not always be the case, however, inasmuch as the center lane pavement marking may be placed at a location that is not the geometric center of the roadway. See United States Department of Transportation Federal Highway Administration, Manual on Uniform Traffic Control Devices (MUTCD), § 3B.01(02) (2009); Illinois Department of Transportation, Illinois Supplement to the National MUTCD, 1, 14 (2009) (adopting Part 3 of the MUTCD). Thus, driving on the centerline pavement marking and driving "upon the right half of the roadway" are not necessarily mutually exclusive acts. 625 ILCS 5/11-701(a) (West 2010). That defendant's vehicle veered *onto* the double yellow center line, would not, in itself, create a reasonable suspicion that defendant violated section 11-701(a) of the Code. The officer conducting the traffic stop would also need to have a reasonable belief that the center line was located in the true center of the roadway. There is no evidence that that is the case here.

¶ 11 Section 11-709(a) of the Code provides:

> "Whenever any roadway has been divided into 2 or more clearly marked lanes for traffic the following rules *** shall apply.
>
> (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." 625 ILCS 5/11-709(a) (West 2010).

In *People v. Leyendecker*, 337 Ill. App. 3d 678, 683 (2003), two members of a divided panel of this court reasoned that the defendant's "momentary one-foot crossing of the fog line as she maneuvered her vehicle through a left-hand curve on a hilly road with poor visibility would not cause a

reasonable person to suspect that defendant was not driving 'as nearly as practicable' within her lane." In *People v. Geier*, 407 Ill. App. 3d 553, 559 (2011), we upheld a traffic stop where all four wheels of a vehicle crossed the fog line and "there were no special conditions such as the poor visibility in *Leyendecker* that would have accounted for defendant's driving error." Again, however, both cases involved vehicles that actually crossed a lane marker rather than merely traveling on it.

¶ 12 Neither *Leyendecker* nor *Geier*, nor any of the other cases cited by plaintiff, deals with the precise issue presented in this case and they are not, in our view, sufficiently on point to meet even the low burden under *Talandis* of making a *prima facie* case for reversal. We might have been willing to overlook the failure to address the precise question raised on appeal if the governing law were well settled, but the issue is one of first impression in Illinois. Moreover, the absence of Illinois case law does not excuse plaintiff's failure to cite pertinent authority; courts in other jurisdictions considering very similar statutory language have addressed the question of whether merely touching a lane marker is grounds for a traffic stop. See *United States v. Colin*, 314 F.3d 439, 444 (9th Cir. 2002) (traffic stop was invalid because "[t]ouching a dividing line, even if a small portion of the body of the car veers into a neighboring lane, satisfies the statute's requirement that a driver drive as '*nearly as practical* entirely within a single lane' " (emphasis in original)); *United States v. Bassols*, 775 F. Supp. 2d 1293, 1302-03 (D. N.M. 2011) (determination of whether a motorist violates a New Mexico statute requiring a motorist to drive " 'as nearly as practicable within a single lane' " (N.M. Stat Ann. §66-7-317 (1978)) by making contact with the line dividing the road from the shoulder entails a fact-sensitive inquiry requiring consideration of the weather, road features, and other circumstances bearing on the motorist's ability to keep the vehicle within its lane, and traffic stop was permissible where motorist was driving a normal-sized automobile on a straight, well-

maintained stretch of interstate highway with no obstacles and at a time when there was no wind); see also *United States v. Lopez-Rojo*, No. 3:07-CR-00080-LRH-RAM, 2008 WL 2277495 at *5 (D. Nev. May 29, 2008) (distinguishing *Colin* because defendant crossed over the fog line rather than merely touching it).

¶ 13 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 14 Affirmed.